

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REC SOFTWARE USA, Inc.,

Plaintiff,

v.

HTC AMERICA, INC., a Washington
corporation, et al.

Defendants.

Lead Case No. 2:14-CV-1025 MJP

[Consolidated with Non-Lead Case Nos.
2:14-CV-1048-MJP; 2:14-CV-1050-MJP;
2:14-CV-1053-MJP; 2:14-CV-1056-MJP;
2:14-CV-1059-MJP; 2:14-CV-1060-MJP;
2:14-CV-1062-MJP]

**DEFENDANTS' MOTION TO STRIKE
PLAINTIFF REC SOFTWARE USA,
INC.'S INFRINGEMENT
CONTENTIONS**

**NOTE ON MOTION CALENDAR:
February 6, 2015**

Defendants' Motion to Strike Infringement Contentions
(2:14-cv-01025-MJP)

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I. INTRODUCTION

Defendants, by and through their undersigned counsel, jointly move the Court to strike portions of Plaintiff REC Software USA, Inc.'s ("REC") Infringement Contentions as improper because (i) they allege acts of infringement which are not legally applicable to method claims (the only type of claim asserted) and (ii) even for the limited alleged acts which are applicable to method claims (*e.g.*, the act of "using"), the infringement contentions fail to inform one as to how allegedly infringing pre-installed applications on the accused mobile devices actually practice the claimed method as required by Local Patent Rule ("LPR") 120. Specifically, REC's Infringement Contentions ("ICs") are improper in each of the following respects:

- A patent method claim cannot be directly infringed by making or selling a device that allegedly practices the steps of the method, yet the ICs include claims that the Defendants directly infringe the asserted method claims by making, offering to sell, selling, and importing the accused mobile devices;
- for the remaining claim (that Defendants practice the patented computing process), the ICs fail to provide a limitation-by-limitation claim chart as the Local Rules require. Instead, the ICs list dozens of pre-installed application programs without explaining how any one application (let alone all of them) might satisfy a single claim limitation;
- the ICs also include an "Appendix C," which contains more than 1.3 million documents and files (many of which cannot be processed by standard software tools), despite the fact that the ICs never substantively discuss the materials in Appendix C in relation to any claim limitation; and
- the ICs fail to provide an element-by-element analysis for any specific mobile device, instead generally referring to generic versions of the Android operating system ("Android"), including versions of Android which were not even released until after expiration of the asserted patent.

Infringement contentions are intended to require patent holders to "crystallize their theories of the case early in the litigation and to adhere to those theories once they have been disclosed."

REC Software USA, Inc. v. Bamboo Solutions Corp., No. C11-0554JLR, 2012 WL 3527891, at *3 (W.D. Wash. Aug. 15, 2012) (*citing O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d

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1 1355, 1366 n.12 (Fed. Cir. 2006)). As Judge Robart noted in *REC Software USA, Inc. v. Bamboo*
 2 *Solutions Corp.*, this Court has often “view[ed] the Northern District of California cases
 3 interpreting their own local patent rules to be of assistance in this court's effort to fashion its own
 4 standard” given the similarity between the two courts’ local patent rules. No. C11-0554JLR, 2012
 5 WL 3527891, at *3 (W.D. Wash. Aug. 15, 2012). And the Northern District of California has
 6 regularly opined that early crystallization is necessary to “prevent the ‘shifting sands’ approach to
 7 claim construction.” *Atmel Corp. v. Info. Storage Devices, Inc.*, C 95-1987 FMS, 1998 WL
 8 775115, at *3 (N.D. Cal. Nov. 5, 1998).

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 11 But REC’s ICs fail to provide critical information about how third-party applications and
 12 how each version of Android infringe the patent on an element-by-element basis as required by
 13 LPR 120. This problem is particularly acute in this matter as the accused Android software and
 14 functionality is developed and supplied by third parties who are not defendants in this matter and,
 15 accordingly, Defendants’ own ability to prepare defenses is greatly prejudiced absent clear
 16 infringement contentions. For these reasons, these parts of the ICs fail to comply with the Local
 17 Patent Rules and should be stricken.

18 **II. FACTUAL BACKGROUND**

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 21 REC served its ICs on November 7, 2014 asserting that Defendants directly infringed
 22 claims 1, 2, 3, 4, and 6 of U.S. Patent No. 5,854,936 (“the ’936 Patent”). The ’936 patent was
 23 issued on December 29, 1998 and expired on August 22, 2011, almost three years before REC
 24 filed suit. All five asserted claims are method claims. Though the ’936 patent also included
 25 “apparatus” type claims 9-22, in its contentions, REC made clear it was not asserting any apparatus
 26 claims in this matter, specifically stating “REC does not reserve the right to assert any of claims 9-
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22 of U.S. Patent No. 5,854,936 against [each] Defendant.” Decl. of Julia Kropp in Supp. of Defs.’ Mot. to Strike REC’s Infringement Contentions (“Kropp Decl.”), Ex. 1 [REC’s Infringement Contentions] at p. 2, Ins. 23-24. All of the method claims relate generally to method practiced by a computer. REC alleges that Defendants directly infringe these method claims by, *inter alia*, “Making the Accused Devices,” “Offering to Sell the Accused Devices,” “Selling the Accused Devices,” and “Importing the Accused Devices.” *Id.* at p. 4, Ins. 2-5.

A. Contentions Regarding Android

REC’s infringement contentions purport to accuse versions 1.0-4.0.3 (including 32 separate versions) of the “Android” operating system. The Android operating system is developed by third-party Google Inc., who is not a defendant in any of the REC cases.

The ICs accuse of infringement Defendants’ “mobile phone and/or tablet that include and implement at least (i) an operating system; (ii) certain pre-installed applications, and (iii) a Dalvik virtual machine (“Dalvik VM”), including any Dalvik VM included with one or more of the following versions of the Android Operating System software.” *Id.* [REC’s Infringement Contentions] at App. A, p. 1. Although REC’s infringement allegations are limited to functionalities found in Android (such as the Dalvik VM), the ICs simply march through generic functionalities and commands of Android without tying any of REC’s purported analysis to any particular versions of Android. The substantive portion of REC’s Infringement Contentions where this purported analysis occurs, Appendix A, is identical for all Defendants. Kropp Decl., ¶ 7. REC does not provide a claim chart for each version, nor explain why the accused functionality is assumed to operate the same way across all 32 versions. Kropp Decl., Ex. 1 [REC’s Infringement

Contentions] at App. A, p. 12. In fact, the ICs contain a troubling admission that REC has not examined all the versions of Android named in its ICs:

- “It is *believed* that versions 1.0 and 1.1 of the Android system do not differ from the other versions of the Android system in a way that affects the infringement analysis, *but the source code is not currently publically available.*”
- “It is *believed* that versions 3.0, 3.1, and 3.2-3.2.4 of the Android system do not differ from the other versions of the Android system in a way that affects the infringement analysis, *but the source code is not publicly available.*”

Id. at App. A, p. 11-12 (emphasis added).

B. Contentions Regarding the Pre-Installed Applications

For each device identified, Appendix B also listed some REC documents by bates number, and these documents included a table of numerous (for most devices, hundreds) of applications allegedly “running upon start” for a particular device, along with generally indecipherable “Methodology” and “Notes” sections. Nowhere are these documents discussed (or even mentioned) in Appendix A.

Furthermore, although REC alleges in its ICs that the Defendants’ mobile products infringe because “certain pre-installed applications” practice the claimed method, REC does not provide any element-by-element analysis of any of the pre-installed applications to show how they allegedly infringe. In fact, Appendix A fails to even mention any specific pre-installed application or device by name.

C. Meet-and-confer efforts and subsequent clarification from REC

Counsel for Motorola sent REC a letter on November 21, 2014, identifying the various deficiencies in the ICs—including REC’s failure to provide a proper element-by-element claim chart, REC’s generic and unsubstantiated allegations regarding specific devices and versions of

Android, REC's unsubstantiated allegations of joint infringement, and REC's allegations of legally-insufficient grounds for infringement. *Id.*, Ex. 2 [2014-11-21 R. McBrayer Letter to T. DeJong]. On December 4, 2014, Dell also sent a comprehensive letter to REC identifying these deficiencies. *Id.*, Ex. 3 [2014-12-4 E.Mar Letter to T.DeJong]. Dell and Motorola, thereafter, engaged in extensive meet-and-confer discussions with REC on these issues in an attempt to reach resolution without involving the Court. Dell and Motorola also objected to the unsubstantiated and open-ended allegations of joint infringement included in the ICs.

On January 14, 2015, REC served its Clarification, Amendment, and Supplement Regarding its Disclosure of Asserted Claims and Infringement Contentions. *Id.*, Ex. 4 [REC's Supplemental Contentions]. In the Clarification, REC withdrew its joint infringement allegations and its infringement assertion based on the doctrine of equivalents; however, REC did not remedy the deficiencies to which this motion is directed. *Id.*

III. REC'S INFRINGEMENT CONTENTIONS ARE DEFICIENT AND PORTIONS SHOULD BE STRICKEN.

A. The Allegations in REC's Contentions that Allege Infringement of Method Claims Based on Making, Offering to Sell, Selling, and Importing Accused Devices Should Be Stricken as a Matter of Law.

Direct infringement of a patented method is limited to the actual performance of the steps of the claimed method. As the Federal Circuit noted just last month, "none of our decisions have found direct infringement of a method claim by sales of an end user product which performs the entire method, and we decline to do so here." *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201 (Fed. Cir. 2014); *see also Ricoh Co., Ltd. v. Quanta Computer Inc.*, 550 F.3d 1325, 1335 (Fed. Cir. 2008) ("Accordingly, we hold that a party that sells or offers to sell software containing instructions to perform a patented method does not infringe the patent under § 271(a)");

1 *Mformation Techs., Inc. v. Research in Motion Ltd.*, 830 F. Supp. 2d 815, 839 (N.D. Cal. 2011)
 2 (“Plaintiff must show that Defendants actually used the [accused] software within the United
 3 States in a way that directly infringes the patent-in-suit, i.e., in a way that practiced each step of the
 4 patented method within the United States”) (citing *Ricoh*, 550 F.3d at 1335). “Congress has
 5 consistently expressed the view that it understands infringement of method claims under section
 6 271(a) to be limited to use.” *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1319 (Fed. Cir.
 7 2005). “The sale or offer to sell handheld devices is not, in and of itself, enough [to infringe a
 8 method claim].” *Id.* at 1321. “To infringe a method claim, a person must have practiced all steps
 9 of the claimed method.” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir.
 10 2009) (citing *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 775 (Fed. Cir. 1993)). “A method claim is
 11 directly infringed only by one practicing the patented method.” *Joy Techs.*, 6 F.3d at 775
 12 (emphasis in original).

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 14 Indeed, this is the only logical interpretation of the statute, given that “[d]irect infringement
 15 occurs only when someone performs the claimed method.” *i4i Ltd. P’ship v. Microsoft Corp.*, 598
 16 F.3d 821, 850 (Fed. Cir. 2010). Making, offering to sell, selling, or importing a mobile device
 17 capable of performing a method is not the same as performing that method, and is not an
 18 infringement. *See, e.g., Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1359
 19 (Fed. Cir. 2009) (“The law is unequivocal that the sale of equipment to perform a process is not a
 20 sale of the process within the meaning of section 271(a)” (internal citations and quotations
 21 omitted)). Any one of these cases should have prevented REC from leveling its baseless claims.

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 23 REC indicated instead during the parties’ conferences that it believes *CLS Bank Int’l v.*
 24 *Alice Corp.*, 667 F. Supp. 2d 29 (D.D.C. 2009) entitles it to assert infringement of a method claim
 25

1 based on making, offering to sell, selling, or importing devices. But REC misreads this case. The
 2 method claims at issue in *CLS Bank* recited a process of exchanging a financial obligation between
 3 parties. *Id.* at 31-32. The accused infringer, CLS, sold banks a “continuous linked settlement”
 4 service that settled payment instructions related to underlying foreign exchange transactions. *Id.* at
 5 32. The patentee argued that performance of the CLS *service* infringed every step of the asserted
 6 method claims and, therefore, that CLS’s sale of its *service* directly infringed the method claims.
 7 *Id.* at 36. The court held that “one who ‘sells’ or ‘offers to sell’ each and every step of a patented
 8 method infringes the patent.” *Id.* at *37. Thus, *CLS Bank* applies to the narrow instance in which
 9 the thing being sold is the service of performing the claimed method itself (e.g., as a consulting
 10 service)—not where the thing being sold is a *device* that allegedly performs the claimed method.
 11 As *NTP* made clear, the sale of a device that allegedly performs a claimed method cannot directly
 12 infringe a method claim. 418 F.3d at 1321.

13 Here, despite that well-settled tenet of patent law, REC’s ICs improperly assert that the
 14 asserted method claims can be infringed by the acts of “making,” “offering to sell,” “selling,”
 15 and/or “importing” the accused mobile devices. Kropp Decl., Ex. 1 [REC’s Infringement
 16 Contentions] at p. 4, lns. 2-5. As explained in *NTP*, one cannot actually use or practice the
 17 claimed method (as is required to prove infringement) by making, offering to sell, selling, and/or
 18 importing a mobile device. *See Cardiac Pacemakers*, 576 F.3d 1359. Accordingly, the Court
 19 should strike the portion of REC’s ICs that improperly allege infringement by making, selling,
 20 offering to sell, or importing the accused mobile devices. *See, e.g., Shared Memory Graphics LLC*
 21 *v. Apple Inc.*, No. C-10-02475 MMC JSC, 2011 WL 3878388, at *8 (N.D. Cal. Sept. 2, 2011)

(granting motion to strike Infringement Contentions). Doing so will prevent needless discovery activity into Defendants' manufacturing processes, sales organizations, and importation records.

B. REC Fails to Provide a Claim-by-Claim, Element-by-Element Analysis of How Pre-Installed Applications Running on the Accused Devices Allegedly Satisfy the Elements of the Asserted Method.

The Local Patent Rules require REC's "Disclosure of Asserted Claims and Infringement Contentions" to contain the following information:

"A chart identifying specifically where each element of each Asserted Claim is found within each Accused Device, including for each claim element that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Device that performs the claimed function.

LPR 120(c) (emphasis added). REC's allegations contain no such chart.

The lack of a chart is an administrative problem, but importantly, is one that masks underlying substantive problems. In its ICs, REC alleges that "certain pre-installed applications" found in the accused devices satisfy the elements of the asserted method claim. *See* Kropp Decl., Ex. 1 [REC's Infringement Contentions] at App. A, p. 1. The ICs then contain, for each Defendant, a long list of all applications allegedly on each phone. *See, e.g.,* Kropp. Ex. 6 [List of Apps]. REC, however, fails to identify anywhere, in chart or verbiage, where or how any pre-installed applications satisfies a claim limitation. Indeed, Appendix A to the ICs never even mentions any pre-installed applications. The applications running on the Defendants' devices are provided by any number of third-party developers. REC's ICs are not connected in any way to these applications, and thus there is no basis for opening discovery to this extent and requiring defendants to seek documents from potentially hundreds of non-party application developers.

Moreover, REC improperly attempts to keep the door open for future contentions against other applications that it has not even listed, stating that "the listed pre-installed

1 applications programs are intended to be merely exemplary, and other pre-installed programs
2 are intended to be included within the scope of these infringement contentions to the extent
3 applicable.” Kropp Decl., Ex. 1 [REC’s Infringement Contentions] at App. A, p. 2. REC
4 attempts the same tactic with respect to the identification of Accused Devices in Appendix B,
5 similarly stating that “the listed phones and/or tablets are intended to be merely exemplary,
6 and other phones and/or tablets are intended to be included within the scope of these
7 infringement contentions to the extent applicable.” *Id.* at App. B. This is improper and
8 inconsistent with the requirements of the Local Patent Rules, which require identification of
9 each Accused Device, and with respect to each device, a “chart identifying specifically where
10 each element of each Asserted Claim is found within each Accused Device.” LPR 120(c).
11 Defendants cannot defend against application programs or mobile products that are not
12 named.
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16 REC tries to obfuscate its neglect in providing anything specific about the accused
17 products. At no place in Appendix A does REC identify a specific application by name, much
18 less provide a claim-by-claim, element-by element analysis of any specific applications. In
19 sections labeled as “background on the technology” and in its purported claim-by-claim
20 analysis, REC generally references functionalities, commands, and operations of Android but
21 never indicates in this verbiage or anywhere else how any of the pre-installed applications on
22 any accused mobile devices uses any of those functionalities, commands, and operations. *Id.*
23 at App. A, pp. 11-115. Finally, REC dumped 1.3 million pages and files in an Appendix C to
24 the ICs (many of which cannot be opened by standard software tools) without linking these
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pages and files to its purported claim-by-claim analysis. Nowhere does Appendix A mention any document or file produced as part of Appendix C.

The infringement contentions should identify how the accused “products infringe with as much specificity as possible with the information currently available” to REC. *France Telecom, S.A. v. Marvell Semiconductor, Inc.*, No. 12-CV-04967 WHA NC, 2013 WL 1878912, at *4 (N.D. Cal. May 3, 2013) (citation omitted). The Patent Local Rules are designed to “ensure all the litigants put all their cards on the table up front.” *Atmel Corp. v. Information Storage Devices, Inc.*, C 95-1987 FMS, 1998 WL 775115, *3 (N.D. Cal. Nov. 5, 1998). REC has failed to perform this basic step.

Absent such information, the Defendants are left to guess how and which of the pre-installed applications on their mobile devices may allegedly perform the claimed method. As a result, REC’s infringement allegations with regard to the pre-installed applications referenced in Appendix B and the materials in Appendix C should be stricken. *See, e.g., Shared Memory Graphics*, 2011 WL 3878388, at *8. In the alternative, REC should supplement its contentions to provide the required element-by-element analysis of how each allegedly infringing pre-installed application practices the claimed method and what portions of Appendix C (i.e., what portions of which particular document) are being relied upon by REC to support its contentions for each limitation.

C. REC’s Generic Allegations Against Android Are Insufficient.

REC’s ICs focus exclusively on functionality it claims is found in Android. The ICs generically list 32 versions of generic Android from Google, many of which have not been analyzed by REC’s own admission, and fail to provide any claim chart or other analysis of how all

1 the versions of Android found in the defendants' mobile products infringes. Kropp Decl., Ex. 1
 2 [REC's Infringement Contentions] at App. A, pp. 1, 11-12. This is particularly significant in this
 3 case because although the asserted '936 patent expired in August 2011, REC's ICs claim
 4 infringement based on the use of ten versions of Android which were not released until *after* the
 5 '936 Patent had expired. As a matter of law, REC cannot assert infringement regarding the use of
 6 technology that occurred after the patent-in-suit has expired. Such allegations should be stricken.
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8 REC also neglects to explain its basis for why it contends the accused functionality
 9 operates in the same manner across all 32 versions of Android and all Accused Products. This is
 10 particularly troubling in view of the fact that the specific Android source code for many of the
 11 specific accused mobile devices (not just the generic Google version) *is* publicly available, which
 12 many of the Defendants specifically informed REC of back in September 2014 before the ICs were
 13 due. Kropp Decl., Ex. 4 [2014-9-26 R. McBrayer letter to T. DeJong]. Absent this required
 14 information, the Defendants are prejudiced in their ability to prepare their defenses in the case. As
 15 a result, REC's ICs should be stricken. In the alternative, REC should be compelled to provide a
 16 claim chart for each version of Android that is accused or provide the basis for why the accused
 17 functionality operates in the same manner across all versions of Android.
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21 **IV. CONCLUSION**

22 For the reasons set forth in Section III.A, the Court should strike REC's Infringement
 23 Contentions with respect to sale, manufacture, offer to sell, and importing of the accused mobile
 24 devices. As explained in III.A, method claims cannot be infringed by the selling, making, offering
 25 to sell, or importing of a *device* as a matter of law. Defendants should not face the expense and
 26 burden with mounting defenses to allegations that are simply inapplicable to method claims.
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1 Furthermore, for the reasons set out in Section III.B and III.C, the Court should also strike
2 REC's Infringement Contentions, or in the alternative, compel REC to supplement those
3 contentions with respect to the following deficiencies: (i) REC's failure to provide an element-by-
4 element infringement analysis, with such analysis to describe how each pre-installed application on
5 each accused mobile device allegedly practices the claimed method; (ii) REC's failure to identify
6 how each of the 32 version(s) of Android allegedly found on each accused mobile device prior to
7 the expiration of the patent-in-suit allegedly practices the claimed method; and (iii) the basis for
8 REC's contention that the accused Android functionality operates in the same manner across all
9 versions of Android.
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 20__, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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